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Supreme Court, U.S.
FILED
FEB 1 1996
CLERK

No. 95-1066

In The

Supreme Court of the United States

October Term, 1995

RICHARD AND LINDA SIMONE,

Petitioners,

vs.

WORCESTER COUNTY INSTITUTION FOR SAVINGS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming judgments dismissing Petitioners' case when Petitioners claim a party was wrongfully sequestered during trial.

2. Whether the Court of Appeals erred in affirming judgments dismissing Petitioners' case when Petitioners argue defects at trial regarding evidence.

3. Whether the Court of Appeals erred in affirming judgments dismissing Petitioners' case without granting the Petitioners' request for oral argument.

STATEMENT UNDER RULE 29.6

The parent company of Respondent, Worcester County Institution for Savings n/k/a The First National Bank of Boston, is Bank of Boston Corporation, which has issued shares to the public.

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Statute Cited:

Massachusetts Consumer Protection Act, M.G.L c. 93A 2

Rules Cited:

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OPINIONS BELOW, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

On June 4, 1992, the United States Bankruptcy Court for the District of Massachusetts (Queenan, J.) (the "Bankruptcy Court") entered a judgment dismissing Petitioners' Complaint and allowing Respondent's claim in the amount of $22,804.

On December 21, 1993, the Honorable Nathaniel M. Gorton, United States District Judge at the United States District Court for the District of Massachusetts (the "District Court") entered an Order affirming the judgment of the Bankruptcy Court. Petitioners' Motion for Reconsideration was denied.

The United States Court of Appeals for the First Circuit (the "Court of Appeals") entered an Order on April 20, 1995 affirming the District Court's affirmance of the Bankruptcy Court's dismissal of Petitioners' case. Said opinion is endorsed to be "Not for Publication." Petitioners' request for rehearing was denied.

Respondent relies upon the following additional authorities:

Federal Rule of Appellate Procedure 34; and

Local Rule No. 34.1 of the United States Court of Appeals for the First Circuit.

STATEMENT OF THE CASE

Respondent submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by the Petitioners ("Petition"). This Brief in Opposition provides Respondent's reasons for denying the Petition, and addresses specific perceived misstatements and omissions of fact and law in the Petition.

A. Procedural History

The Petitioners filed the underlying adversary action with the Bankruptcy Court alleging that Respondent's foreclosure sale was commercially unreasonable and constituted a violation of Massachusetts Consumer Protection Act (M.G.L. c. 93A). At the conclusion of the trial heard on June 4, 1992, the trial judge dismissed the Petitioners' case and granted Respondent's claim for $22,804. Petitioners' Motion for Reconsideration was denied.

Petitioners' subsequent appeal to the District Court resulted in the District Court's affirming the decision of the Bankruptcy Court. Petitioners' Motion for Reconsideration was denied.

Petitioners then appealed to the Court of Appeals, which dispensed with hearing argument and affirmed the District Court's decision. Petitioners filed a Petition for Review or Rehearing which was also denied on or about May 22, 1995.

B. Statement of Facts

Respondent adopts the summary of facts contained in the section entitled "Background" in the District Court's Memorandum and Order (Pet. App. A).

Pursuant to Supreme Court Rule 15.2, Respondent also provides the following corrections of perceived misstatements and omissions of fact in Petitioners' Statement of Case (Petition, 2).

1. Petitioners misstate that there was evidence not before the trial judge during trial.

2. Petitioners misstate that Linda Simone was prejudiced as

a result of her exclusion from the courtroom during the trial since no prejudice has been demonstrated.

3. Petitioners omit that Linda Simone was sequestered at the request of Petitioners' counsel (Pet. App. G. 11-12).

4. Petitioners omit that Linda Simone was neither called by Petitioners to give testimony during the trial nor was she prohibited from testifying.

REASONS FOR DENYING THE WRIT

I.

THERE HAS BEEN NO SHOWING THAT THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

The only issue of federal law that is raised by the Petitioners in any comprehensible fashion is whether the sequestering of Linda Simone during the trial violated her rights. Federal Rule of Evidence 615 provides, in relevant part, as follows:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person. . .

Petitioners argue that Linda Simone, as a party, should not have been sequestered. However, in the instant case, Linda Simone was sequestered pursuant to Petitioners' own motion (Pet. App. C). Further, the Petitioners failed to object during the trial to the sequestering of Linda Simone. As the Court of

Appeals observed "... by failing to object during the bankruptcy proceeding to the sequestering of Linda Simone, the Simones waived the issue." *Cf. United States v. Abbott*, 30 F.3d 71, 73 (7th Cir. 1994) (failure to move for exclusion of witness at trial constitutes waiver of argument on appeal that the court erred in failing to exclude witness) (Pet. App. G-12). Moreover, as the Court of Appeals also pointed out (Pet. App. G-12), even if the Petitioners could demonstrate a violation of the sequestration rules, defendants must demonstrate that the violation created sufficient prejudice to warrant reversal. *See United States v. Warren*, 578 F.2d 1058, 1076 (5th Cir. 1978) and *United States v. Bobo*, 586 F.2d 355,366 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). The only reference by the Petitioners to any prejudice suffered by Ms. Simone is their statement that "she was prejudiced as a result of her exclusion from the courtroom for the entire trial and that her testimony would have impeached the ATR appraiser's testimony" (Pet. at 2). However a review of the trial transcript indicates that Linda Simone was not prevented from testifying. In fact, although listed as a possible witness at the opening of the trial by Petitioners' trial counsel, Petitioners chose not to call her as a witness.

II.

THERE ARE NO COMPELLING REASONS FOR WHICH THIS PETITION SHOULD BE GRANTED.

The other reasons for which the Petitioners request this Court to grant their Petition are neither compelling nor important. Aside from their claim of wrongful sequestration of Linda Simone, which has already been addressed, Petitioners' remaining claims concern evidence not before the trial judge and evidence deleted from trial (Pet. at 2), and a denial of oral argument by the Court of Appeals. As to the former, the Petitioners claims are incomprehensible in that if the evidence

was not before the trial judge, it could not have been admitted as evidence. As to the latter, Rule 34 of the Federal Rules of Appellate Procedure provides that:

> Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed.

Local Rule 34.1 of the United States Court of Appeals for the First Circuit specifically permits the dispensing of oral argument if the court concludes after examination of the briefs and record that:

> (i) the appeal is frivolous; or
>
> (ii) the dispositive issue or set of issues has been authoritatively decided; or
>
> (iii) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Hence, the fact that on appeal the Petitioners were denied oral argument is not an appealable issue.

In essence, the Petitioners have provided this Court with no compelling reasons why their Petition should be granted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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